

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

IN RE PORK ANTITRUST  
LITIGATION

File No. 18-cv-1776  
(JRT/HB)

This document relates to:

ALL CASES

Saint Paul, Minnesota  
January 8, 2021  
9:30 a.m.

HEARING CONDUCTED VIA  
ZOOM FOR GOVERNMENT

BEFORE THE HONORABLE HILDY BOWBEER  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**(MOTIONS HEARING)**

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**P R O C E E D I N G S**

**VIA ZOOM FOR GOVERNMENT**

1  
2  
3  
4 THE COURT: All right. This is the United States  
5 District Court for the District of Minnesota. I'm  
6 Magistrate Judge Hildy Bowbeer. It looks like we've got at  
7 least a couple of people still working on connecting to  
8 audio so, Mr. Cotter, I see you're now connected. We got  
9 one other person still connecting to audio so let me just  
10 give that another moment. It looked like there may be some  
11 challenges there. Yes. All right. Now we've got  
12 Mr. Rashid. We got one other person connecting. Okay, I  
13 think we got everybody connected who intended to be  
14 connected.

15 We are convened by Zoom for a hearing in the  
16 matter of In Re: Pork Anti-Trust Litigation. This is matter  
17 number 18-cv-1776. Specifically we are here for a hearing  
18 in a motion that was filed only in that matter and not in  
19 the other two related pork matters. It's docket number 555  
20 in 18-cv-1776 and it is plaintiffs' motion to compel  
21 custodians and documents.

22 As for we have a court reporter on with us today  
23 who will be preparing the only official transcript of this  
24 proceeding. I'm also recording the proceeding through the  
25 Zoom platform as a backup to the court reporter in case she

1 loses her connection, but her work and the Zoom recording  
2 that I'm making are the only recordings that may be made of  
3 the proceeding.

4 Let me go through and get appearances of counsel.  
5 I'll do it in the way I've done it before and which is  
6 essentially to call the roll as I understand and according  
7 to the information I got in advance of the hearing.

8 So first on behalf of plaintiffs and specifically  
9 the Direct Purchaser Plaintiffs, first I understand that  
10 Arielle Wagner is attending. Ms. Wagner, are you on?

11 MS. WAGNER: Yes. Good morning.

12 THE COURT: And Ms. Wagner, I understand that you  
13 will be the one speaking for all of the plaintiffs with  
14 regard to the motion to compel calendar -- production of  
15 calendars; is that correct?

16 MS. WAGNER: That is correct.

17 THE COURT: All right. In addition for the Direct  
18 Purchaser Plaintiffs, Bobby Pouya.

19 MR. POUYA: Yes. Good morning, Your Honor.

20 THE COURT: Good morning. And Michael Pearson.

21 MR. PEARSON: Good morning, Your Honor.

22 THE COURT: Brian Clark.

23 MR. CLARK: Good morning, Your Honor.

24 THE COURT: Anyone else for the Direct Purchaser  
25 Plaintiffs? Okay.

1                   Turning now to the Consumer Indirect Purchaser  
2                   Plaintiffs.   Rio Pierce.

3                   MR. PIERCE:   Good morning, Your Honor.

4                   THE COURT:   And I understand, Mr. Pierce, that you  
5                   will be the one speaking on behalf of all plaintiffs with  
6                   regard to the motion to compel additional custodians by  
7                   Tyson and JBS USA; is that correct?

8                   MR. PIERCE:   Yes, that's correct, Your Honor.

9                   THE COURT:   All right.   You're speaking a little  
10                  softly.   It's fine for now, but I may need you to speak up  
11                  when the time comes.

12                  MR. PIERCE:   I understand.   Thank you.

13                  THE COURT:   Turning now to the Commercial and  
14                  Institutional Indirect Purchaser Plaintiffs.   Shawn Raiter.  
15                  Mr. Raiter, are you on?   Not yet.

16                  Blaine Finley.

17                  MR. FINLEY:   Good morning, Your Honor.

18                  THE COURT:   And Katherine Barrett Riley.

19                  MS. BARRETT:   Good morning, Your Honor.

20                  THE COURT:   Are you expecting Mr. Raiter to join  
21                  us?

22                  MR. FINLEY:   Not necessarily, Your Honor.

23                  THE COURT:   Okay.   So for right now his appearance  
24                  won't be noted.   I'm sorry.   I missed -- I think I missed  
25                  additional people on behalf of the Consumer Indirect

1 Purchaser Plaintiffs. Let me back up to them. Breanna Van  
2 Engelen.

3 MS. VAN ENGELEN: Good morning, Your Honor.

4 THE COURT: Sorry to have overlooked you.

5 Michelle Looby.

6 MS. LOOBY: Yes, good morning, Your Honor.

7 THE COURT: Brittany Resch.

8 MS. RESCH: Good morning, Your Honor.

9 THE COURT: Are we expecting anyone else on behalf  
10 of the Consumer Indirect Purchaser Plaintiffs?

11 MR. PIERCE: No, Your Honor.

12 THE COURT: Are we expecting anyone else on behalf  
13 of the Commercial and Institutional Indirect Purchaser  
14 Plaintiffs?

15 MR. FINLEY: No, Your Honor.

16 THE COURT: Turning now -- and I know this  
17 matter -- this motion was not brought in the matter related  
18 to the Commonwealth of Puerto Rico, but I understand that  
19 there is counsel on the call for Puerto Rico. Matthew  
20 Weiler.

21 MR. WEILER: Good morning, Your Honor.

22 THE COURT: And Kyle Bates.

23 MR. BATES: Good morning, Your Honor.

24 THE COURT: Anyone else who would like their  
25 appearance noted on behalf of the Commonwealth of Puerto



1 Rico?

2 (No response.)

3 THE COURT: All right. And then the other related  
4 action, again, an action which this motion was brought but  
5 wanting to recognize the appearance of counsel in connection  
6 with the matter brought by Winn-Dixie Stores and Bi-Lo  
7 Holdings. Patrick Ahern.

8 MR. AHERN: Good morning, Your Honor.

9 THE COURT: Anyone else on behalf of Winn-Dixie  
10 and Bi-Lo?

11 MR. AHERN: No, Your Honor.

12 THE COURT: All right. Have I missed anyone who  
13 would like their appearance noted on behalf of any of the  
14 plaintiffs in these matters?

15 (No response.)

16 THE COURT: Turning now to counsel for the  
17 defendants. Agri Stats, Justin Bernick.

18 MR. BERNICK: Good morning, Your Honor.

19 THE COURT: Anyone else for Agri Stats that you  
20 know of, Mr. Bernick?

21 MR. BERNICK: No, Your Honor.

22 THE COURT: Clemens Food Group and the related  
23 Clemens defendants. Christina Briesacher.

24 MS. BRIESACHER: Good morning, Your Honor.

25 THE COURT: Mark Johnson.

1 MR. JOHNSON: Good morning, Your Honor.

2 THE COURT: And anyone else that wants to have  
3 their appearance noted for the Clemens defendants?

4 (No response.)

5 THE COURT: Okay. Now, Hormel, I know there's a  
6 dismissal pending for Hormel. Do I have anyone on  
7 representing Hormel this morning?

8 MR. HALL: You do. It's Isaac Hall, and I think  
9 the dismissal is just for one of the Hormel defendants.

10 THE COURT: Got it. Okay. And is there anyone  
11 other than Mr. Hall appearing this morning on behalf of  
12 Hormel?

13 MR. HALL: Not to my knowledge.

14 THE COURT: Next turning to Seaboard Foods. Peter  
15 Schwingler.

16 MR. SCHWINGLER: Good morning, Your Honor.

17 THE COURT: Anyone else on behalf of Seaboard  
18 Foods?

19 MR. SCHWINGLER: Not this morning. Just me.  
20 Thank you.

21 THE COURT: Smithfield Foods. Brian Robison.

22 MR. ROBISON: Good morning, Your Honor.

23 THE COURT: John Cotter.

24 MR. COTTER: Good morning, Your Honor.

25 THE COURT: Anyone else on behalf of Smithfield

1 Foods?

2 MR. ROBISON: No, Your Honor, that's just the two  
3 of us.

4 THE COURT: Turning to Triumph Foods. Christopher  
5 Smith.

6 MR. SMITH: Good morning, Your Honor.

7 THE COURT: Anyone else on behalf of Triumph?

8 MR. SMITH: I believe Gene Summerlin is also on by  
9 audio.

10 THE COURT: Mr. Summerlin, are you on? I see a  
11 little box with his name on it. Mr. Summerlin, are you on?

12 MR. SUMMERLIN: I am, Your Honor.

13 THE COURT: All right. Anyone else for Triumph?

14 MR. SMITH: No, Your Honor.

15 THE COURT: Tyson Foods. Tiffany Rohrbaugh.

16 MS. ROHRBAUGH: Good morning, Your Honor.

17 THE COURT: Jarod Taylor.

18 MR. TAYLOR: Good morning, Your Honor.

19 THE COURT: And is anyone else on for Tyson?

20 (No response.)

21 THE COURT: Okay. And Mr. Taylor, I understand  
22 you will be speaking at least to the custodians issue  
23 relating to Tyson. Are you going to be addressing any of  
24 the other issues raised by the plaintiffs' motion?

25 MR. TAYLOR: The reverse of that actually, Your

1 Honor. I will be addressing the calendar issue on behalf of  
2 all defendants.

3 THE COURT: All right. And who will be speaking  
4 for Tyson with regard to the custodians issue?

5 MS. ROHRBAUGH: Your Honor, this is Tiffany  
6 Rohrbaugh. I will be addressing the Tyson custodial issue.

7 THE COURT: All right. Got it. Thank you.

8 Anyone else for Tyson? I may have asked that  
9 question. Okay. Nobody else.

10 And then on behalf of JBS USA. Sami Rashid.

11 MR. RASHID: Good morning, Your Honor.

12 THE COURT: And Mr. Rashid, I understand that you  
13 will be addressing the motion insofar as it pertains to  
14 additional JBS custodians; is that correct?

15 MR. RASHID: Yes, Your Honor.

16 THE COURT: And it looks like Jessica Nelson is  
17 also appearing for JBS. Ms. Nelson.

18 MS. NELSON: Good morning, Your Honor.

19 THE COURT: Anyone else for JBS?

20 MR. RASHID: No, Your Honor, just the two of us.

21 THE COURT: Have I missed anyone who wants their  
22 appearance noted on behalf of any of the defendants?

23 All right. Well, I think we now have a complete  
24 roll call. I'm going to not go through my usual speech  
25 about how I want you to behave today because you've heard

1 that speech already. I will just remind everybody who is  
2 not speaking at the time or about to speak to please mute  
3 your audio; and I'll also ask anyone who isn't going to be  
4 addressing some part of this motion also block video. If  
5 you're going to be speaking to some part of this motion,  
6 whether it's calendars or custodians, please go ahead and  
7 leave your video up, but otherwise I'll ask that you block  
8 video. And I'm going to take one moment here and block all  
9 of those extra boxes. All right.

10 So I am now seeing our court reporter, of course.  
11 I am seeing Ms. Rohrbaugh, I'm seeing Mr. Rashid,  
12 Mr. Taylor, Ms. Wagner and Mr. Pierce. So I think I've got  
13 everybody I need. This is plaintiffs' motion. I'm inclined  
14 to start with the calendar issue unless you've got a strong  
15 view to the contrary. And so, Ms. Wagner, I believe that  
16 one is yours; is that correct?

17 MS. WAGNER: Yes, I will be speaking to the  
18 calendar issue and I don't think we have a strong preference  
19 on which one is presented first.

20 THE COURT: All right. Well, let's start there  
21 then.

22 MS. WAGNER: So we are asking defendants to  
23 produce all electronic and hard copy diaries, calendars,  
24 appointment books, to-do lists for each custodian. We think  
25 the calendars and related documents are critical in

1 anti-trust cases. This is not the type of case that  
2 defendants cite to in their brief. It's not an employment  
3 law case or a fraud case or an assault case. It's  
4 anti-trust conspiracy, and these types of documents that  
5 we're talking about today often expose contacts and  
6 coordination between competitors.

7 Calendars show things like internal meetings,  
8 business meetings, you know, social outings with  
9 competitors, and that's directly related to what we allege  
10 in our complaint.

11 THE COURT: Well, I don't -- I don't think the  
12 defendants are disagreeing with the premise that really  
13 relevant stuff can be found in calendar entries. Where the  
14 disconnect is is whether that mandates that they produce  
15 custodians' entire calendars with all entries, saving out  
16 some deeply personal or deeply and irrelevant,  
17 competitively, sensitive information. And so I think that's  
18 what I'd like you to focus on, and particularly if -- and I  
19 recognize your point that the cases they have cited aren't  
20 anti-trust cases, but they do still generally stand for the  
21 proposition that courts are loathe to require the production  
22 of entire diaries, journals, calendars. Have you got cases  
23 in which -- anti-trust cases in which courts have required  
24 that?

25 MS. WAGNER: Your Honor, I mean, in my experience

1 we cited to the *In Re: Generic Drug Litigation* case, and in  
2 that case, you know, anything that hit on a search term and  
3 most go-get documents, you know, including hard copy  
4 documents, electronic calendars, you know, were produced  
5 wholesale unless there was attorney-client privilege or PHI  
6 involved. So there were even less, you know, redactions or  
7 withholdings allowed, and that was appealed all the way up  
8 to the Supreme Court.

9 THE COURT: But you're saying that that's one in  
10 which the parties agreed to search terms and agreed -- or  
11 the Court ordered that everything that hit on a search term  
12 would be produced with these very narrow exceptions.

13 MS. WAGNER: The parties agreed to search terms  
14 but the Court ordered that anything that was a search term  
15 hit or a go-get document, and there were many categories of  
16 go-get documents, were to be turned over without review.  
17 And, you know, I think there were one or two companies where  
18 the parties negotiated a limited relevance review that had a  
19 sampling process in camera by a Special Master. I don't  
20 think anyone enjoyed that process. I don't think we want to  
21 suggest that.

22 THE COURT: This is not volunteering to do that.

23 MS. WAGNER: The default was the hard copy and  
24 electronic calendars were turned over. And in my experience  
25 in the cases that I've worked on, which is almost all

1 anti-trust related, calendars were treated as go-get  
2 documents and handed over, whether in hard copy or .pst  
3 files.

4 THE COURT: All right. Go ahead.

5 MS. WAGNER: Yes, our main concern is with having  
6 large portions of the calendars, you know, redacted or  
7 culled or withheld. So what it comes down to is that the  
8 calendars and journals and appointment books are just a  
9 different sort of document because they are hard to decipher  
10 without the whole context of discovery. You know, I think  
11 we have examples in our briefing of things like, you know,  
12 WB meeting that we are concerned about, you know, things  
13 that aren't relevant on the face of the documents but are  
14 clearly relevant in context.

15 And so if there is a manual review, our concern is  
16 that, you know, anyone looking at just one custodian's  
17 calendar items will miss things that don't appear to be  
18 relevant on their face. It's hard for plaintiffs to look at  
19 just one calendar and tell what's relevant. It's only after  
20 looking at the documents together with everyone else's  
21 documents that we see patterns emerge.

22 THE COURT: So at least in this case at this point  
23 the parties have not agreed to treat calendars as go-get  
24 document, right?

25 MS. WAGNER: I believe that's correct.



1 THE COURT: Okay. And I know you argue that the  
2 ESI Protocol and specifically the redactions clause, if you  
3 will, of the ESI Protocol would preclude what the defendants  
4 are proposing to do, but isn't the better understanding, at  
5 least thinking about electronic calendars, isn't the better  
6 understanding of electronic calendars that they are not a  
7 single, integrated document; that calendar entries are  
8 individual documents. So I guess my sense is that that  
9 redactions clause, at least insofar as we're talking about  
10 electronic calendars, just doesn't apply here. Do you --

11 MS. WAGNER: I think the issues were a little bit  
12 conflated in our briefing. I don't think we're necessarily  
13 saying that electronic calendars are one document. I think  
14 we were referring more to the hard copy calendars. You  
15 know, whether we call it a redaction of one document or  
16 culling or withholding documents, we just don't agree you  
17 can withhold for relevance. So I think we're looking at,  
18 you know, kind of two separate but related issues. Because  
19 I agree hard copy calendars and journals are a little bit  
20 different from electronic calendars.

21 You know, with hard copy documents, it's more  
22 straightforward because this, you know, one bound document,  
23 like you said, or maybe one per year, and we think the ESI  
24 Protocol is even more clear there. But we're -- we're still  
25 concerned with the hard copy documents because I believe

1 defendants said in their briefing they referenced leaving  
2 out pages of calendars or hard copies, documents, and we  
3 don't think that should be allowed under the ESI Protocol.

4 And electronic calendars are a little different  
5 because they can be searched like an e-mail, but unlike  
6 e-mail they serve a different function. You know, some can  
7 be sent to others, you know, with the domain address like an  
8 e-mail, and that would be captured by a search term. But  
9 some calendar entries are for individual's own reference and  
10 it might just say, Call Bill at 3:00. So it's not clear  
11 that we would be getting that document from, you know,  
12 search terms or from a manual review.

13 THE COURT: But essentially what you're saying is  
14 because it may be especially difficult to cull or search or  
15 review calendars, therefore there should be no requirement  
16 that -- I'll speak to electronic calendars for the moment  
17 because the hard copy calendars is a -- that's a tougher  
18 question given the ESI Protocol and, I don't know, I'll have  
19 a conversation with defendants about that.

20 But thinking about the electronic calendars, is --  
21 where is the case law that supports the idea that because it  
22 might be especially difficult to review, therefore it ought  
23 to be turned over in its totality without regard to  
24 relevance or responsiveness?

25 MS. WAGNER: I mean, again, I would point to the

1     *In Re: Generic Drug* case. I think there are things in  
2     electronic calendars that we, you know, might agree to if  
3     defendants want to take the time to go through each entry  
4     one by one; but we don't think that electronic documents are  
5     amenable to search terms. I mean, we are -- we have  
6     submitted our counterproposals to the search terms for  
7     defendants that we are discussing right now, and there --  
8     even if we go with our broadest search terms, there's still  
9     a lot of calendar entries that wouldn't be hit by those  
10    terms. And we've been hesitant to go down that road because  
11    it leads to the problem that we're talking about with the,  
12    you know, Lunch with WB entries that can be relevant but  
13    aren't clear on the face of the document.

14                So I think we could agree to some sort of manual  
15    review of those calendars as long as there are clear  
16    parameters. And to be clear, we haven't talked about those  
17    parameters with my colleagues; but, you know, perhaps  
18    something like, you know, unless it's clearly not relevant,  
19    we want it. You know, we are very much interested in things  
20    like internal meetings and business meetings and, you know,  
21    the drinks with competitors, and those aren't things that  
22    defendants have indicated will be produced.

23                THE COURT: Anything else on this particular  
24    issue?

25                MS. WAGNER: I believe that that hits all of my

1 main points for now.

2 THE COURT: Okay. No doubt I'll come back to you  
3 after I hear from defendants' counsel. Now I understand,  
4 Mr. Taylor, you're the one addressing calendars for the  
5 defendants; is that right?

6 MR. TAYLOR: Correct. Good morning, Your Honor.

7 THE COURT: Good morning. Go ahead.

8 MR. TAYLOR: Sure. So just to start out with a  
9 case that came up a couple of times during opposing  
10 counsel's argument, I got what I believe the case to be open  
11 in front of me, *In Re: Generic Pharmaceutical* case. I don't  
12 think it applies here. I don't think it addressed calendar  
13 entries. The issue before the Court was whether the parties  
14 may redact or withhold.

15 THE COURT: Could you give me a cite so I can make  
16 sure we're talking about the same case?

17 MR. TAYLOR: Yes, I have -- it's a copy so there's  
18 no Federal Reporter cite, but the Westlaw cite is 2019 WL  
19 1613437.

20 THE COURT: Go ahead.

21 MR. TAYLOR: And so my understanding is that case  
22 involved redactions of what were otherwise indisputably  
23 responsive documents and not how we're going to find  
24 responsive documents or whether indisputably nonresponsive  
25 documents should be handed over just so that nothing is

1 misinterpreted or missed. So I don't think it applies  
2 directly to our issue here.

3 With respect to the latter part of the argument we  
4 just heard, I will say I wished plaintiffs had raised that  
5 with us before this morning. My impression is that is a  
6 conversation we tried to have during the meet and confer and  
7 made no progress. We asked --

8 THE COURT: I'm going to -- there's some kind of  
9 scraping noise. I don't know, Mr. Taylor, if something  
10 you're wearing is scraping against your microphone but,  
11 yeah, why don't you try that. Go ahead and speak again and  
12 let's see if sitting up resolves it.

13 MR. TAYLOR: I'm sure that was it, Your Honor.  
14 I'll try to keep my mic away from my tie. Better?

15 THE COURT: Yes.

16 MR. TAYLOR: Great. Thank you.

17 So, you know, we are similarly open to a  
18 discussion about what exactly plaintiffs are looking for  
19 but, you know, the issue in the motion is whether we are  
20 going to produce everything wholesale. And I'm glad to hear  
21 that perhaps that is no longer plaintiffs' position because  
22 I do think that is, as set forth in our brief, there's no  
23 case law support for it and there's no rationale for  
24 treating this case differently from every other case that  
25 involved review of electronic documents.

1 THE COURT: What about the argument -- and I know  
2 it was you that pointed it out in your brief that at this  
3 point you don't necessarily know how many custodians had  
4 those, you know, vettable Day Timers and, you know, the  
5 calendars that we used to keep, but on the assumption that  
6 there are some of those out there during the class period,  
7 how do you square your position on those with the redactions  
8 provision in the ESI Protocol?

9 MR. TAYLOR: Well, the ESI Protocol, as they all  
10 are, is necessarily, you know, it's a rule that is a broad  
11 rule intended to address both of the issues the parties can  
12 foresee at the time. I would say that arguably this  
13 specific issue wasn't really foreseen when that specific  
14 provision was negotiated and that calendar entries are  
15 different from the usual documents, and therefore the  
16 rationale against redactions really doesn't apply to  
17 calendar entries in the same way that it might to an e-mail.

18 You know, if you're taking a single document  
19 that's a whole year or even a whole month, each of those  
20 entries is a discrete entry. It's put in at a different  
21 time about a different subject matter for a different  
22 purpose. So, you know, as we described somewhat in our  
23 brief, an entry made at one time in January just won't  
24 likely provide context for a different entry about a  
25 different subject made in September.

1           And that's completely different from the typical  
2       document, a Word document or an e-mail to which the ESI  
3       Protocol was more intended to apply to where it's all made  
4       around the same time and therefore one part of it could  
5       provide context to a different part of it. I just think  
6       calendar entries are radically different in that respect.

7           You know, as we discussed, the electronic  
8       calendars are more clearly different documents where each  
9       entry is a different document. And I don't think it is  
10      rational to treat them differently depending on whether they  
11      are hard copy or electronic just because of the change in  
12      technology. The principle is just the same. Each entry is  
13      really discrete in a calendar and we have cited a number of  
14      cases that at least indirectly, you know, hint at that.  
15      That really diaries, calendars and similar documents  
16      should -- each entry it is fair to treat as a separate  
17      quasi-document, so to speak.

18           THE COURT: All right. Anything else?

19           MR. TAYLOR: You know, I had a fair bit to say  
20      about why defendant should not be required to produce every  
21      entry; but again, on the understanding that that perhaps is  
22      no longer plaintiffs' position, and we will go back to meet  
23      and confer to the extent necessary, I think those are really  
24      the highpoints as long as I've answered all of Your Honor's  
25      questions.

1           THE COURT: I guess I don't know for sure if  
2           that's not still plaintiffs' position or if they were  
3           suggesting, if I was bound and determined to go against  
4           them, suggesting another possibility. But let me check back  
5           with Ms. Wagner and if it turns out that you overestimated  
6           her position, I'll give you a chance to make any additional  
7           points you care to. So I'll let you go on mute.

8           Ms. Wagner.

9           MS. WAGNER: Yeah, I -- I'm hesitant to say that  
10          we are for sure going to agree to some sort of, you know,  
11          clear parameters on what type of relevance review would be  
12          allowed or not. I think our position is still that we want  
13          all of the calendar entries except for those that we have  
14          carved out in the ESI Protocol.

15          And I think we have discussed certain limiters  
16          before with defendants and we just could not agree. I  
17          think, for instance, some of the defendants referenced, you  
18          know, producing only calendar entries that talked about pork  
19          or production or output capacity; and, you know, that's just  
20          not going to get plaintiffs what we are seeking.

21          And then I just want to clarify that I think I  
22          agree with Mr. Taylor that the *Generic Drugs* order that I  
23          cite doesn't specifically mention calendar entries in it. I  
24          was just expressing my experience in the case.

25          THE COURT: All right. I appreciate that. Thank



1       you.

2               All right. So, Mr. Taylor, with that  
3 clarification, anything -- any additional points you wanted  
4 to be sure to make?

5               MR. TAYLOR: A few highpoints, yes. If you will  
6 entertain them, I appreciate it.

7               You know, I think it is worth emphasizing the  
8 breadth of plaintiffs' original ask then. There's really no  
9 attempts to distinguish among custodians those who have  
10 decision-making authority from those who don't, who are  
11 involved in pork production from accountants or any other  
12 custodian. There's no attempt to limit the request to  
13 relevant dates such as dates of the relevant trade  
14 association events; and of course, as we have been  
15 discussing, no attempts to limit the request to the relevant  
16 subject matter. You know, so this is really a complete, I  
17 think as Your Honor noted, attempt to jettison the concept  
18 of relevance with respect to these documents.

19              And to be clear to another point that came up  
20 during the first portion of plaintiffs' argument, defendants  
21 will be diligent in doing their responsiveness review. As I  
22 was preparing for this argument one of my colleagues gave an  
23 anecdote from when she was an associate and she said she had  
24 to review calendars and this one custodian only used  
25 initials, but they went back and they found out what those

1 initials meant. They did their diligence, and by the end of  
2 the review she could read the calendar as well as the  
3 custodian.

4 And we are not suggesting that we will be  
5 lackadaisical about this, nor will we unilaterally determine  
6 what is relevant and what is not. All defendant seeks is to  
7 determine what is responsive and what is not, which is the  
8 ordinary course in review. And plaintiffs' brief in fact  
9 acknowledges, as I think it must, that not every calendar  
10 entry is actually relevant to what they are seeking. In  
11 fact, I'm not sure that most internal meetings are really  
12 relevant to what they are getting at. Their brief mentions  
13 competitor communications. And certainly in that case most  
14 of what plaintiffs are asking for will not be relevant.

15 In Tyson's case in particular I know that we have  
16 custodians whose primary responsibility is or has been in  
17 the relevant period other products other than pork. So it  
18 is really an extraordinary look under the hood that  
19 plaintiffs seek and we don't believe that they have  
20 justified turning discovery rules on its head so that  
21 plaintiffs can do the respondent's review instead of  
22 defendants.

23 And again, plaintiffs will have ample opportunity  
24 to seek out the types of evidence they are seeking. One of  
25 their examples from their brief that they were worried could

1 be misinterpreted is a call with Bill. But plaintiffs have  
2 already received call records in this case and they have  
3 subpoenaed call records from carriers. At the end of the  
4 day they are going to know who all of the calls were to and  
5 from. And they are similarly to receive millions of pages  
6 of e-mails, dozens of depositions, which is the rationale  
7 underlying a decision denying the production of complete  
8 calendar entries in the *Eshelman v. Puma Biotechnology* case  
9 that defendants cite in their brief.

10 And my last point is just that I don't think the  
11 prejudice of what plaintiffs are seeking can be hand-waved  
12 away by pointing to the protective order. Discovery just  
13 doesn't work by entering a protective order and then turning  
14 over all documents to the opposing side for them to review.

15 You know, many employees don't keep a, quote,  
16 unquote, work calendar. They keep a calendar. And that's  
17 where they put their work appointments. Yes, that's  
18 probably most of what will be on the calendar, but that's  
19 also where they put their personal appointments. I know  
20 that's how I do it. The case law recognizes that as a cost.  
21 It's just not fair to the employees to put all of their  
22 information out there like that. It's not enough you have  
23 to turn it over to us. I'm sure they're not happy to see us  
24 coming, but sending it over to multiple -- probably  
25 literally dozens of counsel, other counsel, is not what they

1       bargained for.

2               And similarly, plaintiffs just have no entitlement  
3       to documents about tortillas or beef or chicken, internal  
4       charitable efforts, prayer groups, all of the other things  
5       that could go on a calendar entry.

6               So for those reasons we think that a  
7       responsiveness review as in the ordinary course is warranted  
8       here.

9               THE COURT:   So your proposal specifically,  
10      Mr. Taylor, is what?   In other words, if this were to pursue  
11      a process that defendants believe would make good sense in,  
12      you know, in contrast to turning over all calendar entries  
13      except highly personal information or highly sensitive,  
14      highly-highly sensitive information that isn't relevant,  
15      what would the process be?   What are you looking to have  
16      happen?

17              MR. TAYLOR:   Well, just one clarification.   You  
18      know, defendants don't seek merely to not produce  
19      necessarily highly-sensitive information, but --

20              THE COURT:   I think that's what -- my  
21      understanding is what the plaintiffs claim is you need --  
22      default is all calendar entries come over except the narrow  
23      categories that are described in the ESI Protocol for  
24      redactions, and you want a different process.   What --  
25      precisely what process are you proposing?

1 MR. TAYLOR: For the calendar entries to be  
2 treated like the other documents in this case and to go  
3 through the normal review process, which could involve --

4 THE COURT: Yeah, I'm sorry. My question wasn't  
5 very clear. I do understand that. But you've also talked  
6 about you'd like to meet and confer with plaintiffs. In  
7 other words, there are a couple ways, if I were to deny the  
8 motion, there are a couple of ways it could go. Either you  
9 all kind of do what you're gonna do with calendar entries  
10 but be very clear in your written responses about exactly  
11 what you did. In other words, how you interpreted  
12 responsiveness and precisely what parameters you applied, or  
13 you -- and you suggested this as well here today and in your  
14 brief -- you meet and confer with plaintiffs and try to come  
15 to some consensus about -- and there are a couple of topics  
16 on the table.

17 One is what will be responsive, what are the  
18 parameters you look for. And then there's also been some  
19 discussion certainly on their part, and I think you were --  
20 it sounded like you were amenable to it, about the means of  
21 review. Search terms versus manual, and you suggested you  
22 might be open to a conversation about that as well. So kind  
23 of harkening back to my product liability days, what's your  
24 proposed reasonable alternative design?

25 MR. TAYLOR: We're always willing -- you know,

1 it's a little difficult to say. We're always willing to  
2 meet and confer with the other side. If they have a request  
3 to make that is more reasonable than hand everything over,  
4 we are willing to hear them out.

5 I don't actually think that treating these  
6 calendar entries, other than the other documents we're  
7 negotiating about, differently from those documents is  
8 warranted. I really haven't heard a rationale justifying  
9 that. So we would propose producing what is responsive to  
10 the merely 40 other document requests that plaintiffs have  
11 issued. Calendars entries are certainly a type of document  
12 and we would review those and produce them to the extent  
13 they are responsive to the other requests.

14 To the extent plaintiffs are seeking something  
15 else, we are willing to hear them out. Defendants don't  
16 think it's appropriate for plaintiffs to have a say in how  
17 each of the defendants reviewed those documents; but, again,  
18 you know, we're willing to hear proposals out and kind of  
19 work through that.

20 But it's difficult to make kind of a binding  
21 commitment of exactly what we will do right now without  
22 having that conversation. So I'm just hesitant to do that,  
23 Your Honor. I don't mean to be evasive.

24 THE COURT: All right. Ms. Wagner, let me give  
25 you one more chance at a reply here.

1 MS. WAGNER: Okay. So after hearing more about,  
2 you know, what Mr. Taylor has to say, I think if we had some  
3 guideposts on the electronic calendars, we would be willing  
4 to discuss, you know, the exact parameters of where this  
5 cutoff would be on a manual review.

6 And just to be clear, plaintiffs still really  
7 don't think that redactions of hard copy journals and  
8 calendars are appropriate at all. We're particularly  
9 concerned there, and it's really hard to do anything with  
10 someone's hard copy calendar where pages have been ripped  
11 out. But, you know, I think we are willing to discuss, you  
12 know, if we have some guideposts on the electronic calendar.

13 THE COURT: All right. Okay. So kind of to cut  
14 to the bottom line and then try to work my way back, I am  
15 going to deny the plaintiffs' motion as framed, both as to  
16 electronic calendars as well as the hard copy calendars,  
17 although that is a closer call and I'll talk about that just  
18 a bit.

19 But in that regard, I think Mr. Taylor's point,  
20 which sort of translates to elevating form over substance,  
21 if you will, I think that because entries on hard copy  
22 calendars are also individual entries, and in this regard I  
23 do think that the case law out there, albeit not in the  
24 anti-trust context in which courts have not treated a  
25 journal or a Day Timer or a diary as a single document, but

1 have said that individual entries should be produced as to  
2 the extent relevant and responsive, although within any  
3 individual entry you would not redact except as the ESI  
4 Protocol permits.

5 So I'll apply this ruling both to hard copy and to  
6 electronic documents and I'm persuaded that a wholesale  
7 requirement that all calendar entries during the relevant  
8 time period for all custodians, whether in hard copy or  
9 electronically, goes against Rule 26 and the requirement of  
10 relevance.

11 The question then is kind of what next. I hear  
12 the defendants saying that they would at a minimum read the  
13 other requests, sort of the scope description of other  
14 requests that have been made, onto the request for calendars  
15 and produce responsive entries for calendars the same as  
16 responsive entries for other types of documents and  
17 communications.

18 That being said, I do agree with plaintiffs that  
19 there are some respects in which calendar entries that  
20 aren't on their face responsive or relevant -- well,  
21 responsive, could still be relevant. For example, I think  
22 one of the points you made in your brief, Ms. Wagner, was  
23 where were they? And so you could have an appointment to  
24 talk to so and so on Thursday, and potentially a note about  
25 travel plans two days earlier would tell you something about



1 where that conversation was going to happen.

2 So what I'm going to require is that the parties  
3 do meet and confer to try to come to a description of  
4 relevant and, more particularly, responsive calendar entries  
5 and see if you can get to agreement about what  
6 responsibility the defendants are going to undertake to  
7 produce calendar entries that fit those parameters.

8 With regard to the means of review, ultimately I  
9 agree that's up to defendants, but I do think a good  
10 conversation on that subject would also be helpful. For  
11 example, certainly hard copy calendars I think would be  
12 immensely difficult to review other than manually. And I  
13 think a robust conversation about whether search terms will  
14 be a part of a review strategy for electronic calendars or  
15 whether there are additional means that would be taken, I'm  
16 not saying that plaintiffs get to dictate that, but I do  
17 think that a conversation about that and hopefully an  
18 agreement on that subject could assist in avoiding the need  
19 for repeating the work later.

20 But to that point, certainly, as Mr. Taylor  
21 pointed out, you will have call records, you will have  
22 e-mails, and if e-mails and call records and all of that  
23 other discovery tells you down the line that there are  
24 calendar entries that may have gotten missed, and those are  
25 the kinds of gaps that get brought to the attention of the

1 other side and give rise either to a supplement or to a  
2 motion requiring a supplementation.

3 So I'm denying the motion as framed, but I am  
4 going to instruct you to have that meet and confer.  
5 Whatever comes out of that, I want to be very clear with  
6 defendants that I expect your written responses to reflect  
7 clearly what scope you applied. If it's an agreed scope,  
8 then cite the agreement. If you couldn't reach an agreement  
9 and you came up with your own plan, describe the scope of  
10 what you looked for. I don't want you to say, Well, we  
11 explained it in our brief; or, They should understood that  
12 we were applying these other parameters from these other  
13 requests. Be clear in your response. We looked for and we  
14 produced calendar entries within the following parameters.

15 Mr. Taylor, do you understand what I'm getting at  
16 there?

17 MR. TAYLOR: Yes, Your Honor.

18 THE COURT: Okay. Any questions before we move on  
19 to custodians, Ms. Wagner?

20 MS. WAGNER: No, Your Honor.

21 THE COURT: All right. Mr. Taylor?

22 MR. TAYLOR: No. Thank you, Your Honor.

23 THE COURT: All right. So let's move on to the  
24 issue of custodians. And Mr. Pierce, I believe you were  
25 going to be talking about custodians with respect to both of

1 the defendants. Is that correct?

2 MR. PIERCE: Yes, that's correct, Your Honor.

3 THE COURT: All right. Let me hear from you  
4 there.

5 MR. PIERCE: Okay. To start with, for JBS we have  
6 asked for four custodians. That would be Wesley Batista and  
7 Don Jackson and Andrew Nogueira, who each served as CEO of  
8 JBS USA during the relevant period. We also asked for  
9 Wesley Batista [sic] who was CEO of JBS South America, which  
10 is the parent corporation of JBS USA and also, our  
11 understanding, a controlling shareholder of JBS USA because  
12 of the family's ownership of the company.

13 Our position is that these custodians are relevant  
14 because we have good reasons for believing that each of them  
15 had ultimate responsibility for JBS USA's pork operations.  
16 JBS itself in its own brief stated that JBS USA does not  
17 dispute some of the custodians had ultimate responsibility.  
18 We understand JBS's point that those custodians, because  
19 they were CEO of JBS USA, also oversaw other business units  
20 at JBS USA; but we would also note that both Tyson and  
21 Hormel are also large conglomerates who have multiple  
22 business operations in various protein segments, and each of  
23 those companies have designated those -- the CEOs of those  
24 companies as custodians and we think the same is appropriate  
25 here for JBS.

1           We think that the entire point of a search term  
2     process is that it helps to narrow the ESI collected so  
3     that, you know, through a combination of the search terms  
4     that you hit upon, you're able to relatively easily -- I  
5     don't mean to minimize the burden -- but if there is a  
6     process that works, remove the relevant documents relating  
7     to JBS's beef business and that should significantly lessen  
8     any burden that JBS would face for designating these  
9     individuals as custodians.

10           We have specific reasons for thinking that each of  
11    these individuals have relevant information. For example,  
12    Mr. Batista gave several comments about JBS's pork  
13    operations that we quoted in our complaint. In particular,  
14    in May 2013, Mr. Batista stated that given some restrictions  
15    in supply, we have been able to pass price through the  
16    system and we are seeing good margins in our pork business.  
17    So this is a clear sign that we have been able to pass price  
18    increases in chicken and pork. We think that's a common --  
19    that's very important for the central allegation in this  
20    case, which is the supply restriction as well as  
21    pass-through issues, which are important for class  
22    certification and anti-trust impact. So based on that kind  
23    of statement, we think Mr. Batista should be a custodian.

24           We've also -- I think the case law is clear that  
25    plaintiffs, when they make a request, should have reasons

1 for believing that ESI wouldn't be collected from other  
2 sources. We think there's good reasons to believe based on  
3 JBS's own public statements that, for example, Mr. Batista  
4 and Mr. Batista, the two brothers, were frequently and  
5 directly communicating with each other; and if those  
6 communications are just between them, then there's nobody  
7 else who is going to have that ESI to the extent that it  
8 exists in an e-mail.

9 Similarly, Mr. Jackson and Mr. Nogueira served as  
10 CEO and CFO of JBS USA during a key portion of the  
11 conspiracy period, and so we think that if they had a direct  
12 e-mail communication and nobody else was on it, then it's  
13 not going to be collected from other ESI.

14 So I think those were the key points I wanted to  
15 hit initially. Happy to take questions or move on to Tyson.

16 THE COURT: Aren't there -- yes, in the sense that  
17 one could always surmise that two people talk only with each  
18 other and therefore if you don't collect from either of  
19 them, you don't get those communications, but doesn't there  
20 have to be some reason to anticipate that there are  
21 communications that are truly pertinent to the issues here  
22 and that wouldn't be reflected in the e-mails of the other  
23 custodians? I mean, yes, the CEO always has ultimate  
24 responsibility, but that doesn't -- if that were the only  
25 test, then every CEO would always have to be a custodian.

1           So I'm struggling with whether there's enough here  
2           to show more than speculation that any of these individuals  
3           have unique information within their e-mail accounts that  
4           wouldn't either be in the e-mail accounts of the custodians  
5           that are being searched or wouldn't be discernible once the  
6           results of that production -- of that search were produced.

7           MR. PIERCE: Sure. We -- I understand that  
8           concern, Your Honor. I think we have a reasonable basis for  
9           thinking that they have unique ESI based on their positions  
10          in the company. We also would note that we're talking about  
11          several different individuals who we think are likely  
12          communicating with each other about a very significant part  
13          of JBS's business operations. Our understanding is JBS USA  
14          primarily has two business units, the pork business unit and  
15          the beef business unit.

16          So we think this is distinct, for example, from a  
17          case where you have a CEO of a large company and you're  
18          dealing with an employment dispute or a dispute for a very  
19          small segment of the company's business operations. We're  
20          talking about an important segment of the company's business  
21          operations.

22          And we would also note that JBS provided a  
23          declaration from Mr. Gaddis that simply stated how much ESI  
24          just one of the custodians, Mr. Nogueira, had. But they  
25          have not done anything to show that, for instance, we have

1 done an initial look and there are no documents that are  
2 uniquely hitting on these custodians' ESI versus the  
3 custodians that we have already offered. So based on that,  
4 we think that we have a reasonable basis for thinking that.

5 We'd also note that based on the public statements  
6 that Mr. Batista and Mr. Jackson and Mr. Nogueira also offer  
7 public statements on JBS's pork operations, that these are  
8 reasonable candidates for deposition. And so we think in  
9 order to take an effective deposition of them, it would be  
10 reasonable to want their ESI up front. So I also wanted to  
11 flag that issue.

12 THE COURT: Of course, I would imagine that if at  
13 that point we'll probably be looking at motion practice  
14 about apex depositions, right?

15 MR. PIERCE: Sure, sure.

16 THE COURT: All right. Okay. Anything else  
17 before I hear from Mr. Rashid?

18 MR. PIERCE: No, Your Honor.

19 THE COURT: So Mr. Rashid, what about the point  
20 that alone among the defendants here JBS is the only one  
21 that has not included among its custodians the CEO or CEOs  
22 during the relevant time period?

23 MR. RASHID: Yeah. I think, Your Honor -- first  
24 of all, good morning and happy new year. That's a fair  
25 point to raise and I think it -- I mean, I think you need to

1 start with the standard, the legal standards surrounding  
2 these types of disputes. And I think if you look at page 11  
3 of plaintiffs' briefs, they cite to the Sedona Principles  
4 and they say: For the purposes of resolving disputes over  
5 designated ESI custodians, determining what is relevant and  
6 proportional under the circumstances of each matter often  
7 requires a highly fact-specific inquiry. And we agree with  
8 that, which is why we don't agree with the assertion that  
9 being a CEO automatically makes you a document custodian.

10 But more to that, plaintiffs omit from their brief  
11 that very next line in the Sedona Principles which states:  
12 Thus the responding party, not the court or the requested  
13 party, is both tasked with making those determinations and  
14 generally in a better position to make those decisions.

15 And it's just simply not the case that because  
16 other defendants determined for sake of compromise or for  
17 sake of the way those companies were managed they were  
18 willing to propose or accept their CEOs as custodians, it  
19 doesn't mean that that's necessarily true here. And I think  
20 that what we've tried to show, Your Honor, through our brief  
21 and through the declaration of Mr. Gaddis, who has been with  
22 the company in senior human resources and legal roles since  
23 2007 and beyond covering the entire relevant time period, is  
24 that people who are really making the relevant decisions  
25 that lie at the heart of plaintiffs' case, which are



1 decisions about, as they say on page 11 of their brief,  
2 business decisions regarding pork supply, output and  
3 pricing, that is the Pork Management Team. That is  
4 literally what that group, that leadership group is called,  
5 and they meet day in and day out, and they manage and make  
6 the decisions about the company's procurement and raising of  
7 hogs for pork processing. They make decisions about how  
8 much their pork is going to be produced, and they make  
9 decisions about the price at which the pork is sold.

10 And so the CEO, the disputed custodians, aren't  
11 involved in those decisions that lie at the heart of this  
12 dispute. And that is why we said, you know, No, we don't  
13 think they are necessary. You know, we're not going to  
14 limit our proposal at the end of the day to just the Pork  
15 Management Team, although frankly I think that's defensible.  
16 We ended up giving them a bunch more custodians so we're up  
17 to 28 custodians.

18 But we said with respect to the CEOs and  
19 Mr. Joesley Batista, who had no management role whatsoever  
20 at JBS USA, we said, you know, they weren't involved in  
21 these decisions.

22 So I don't think it's necessarily a situation  
23 where what's good for the goose is good for the gander.  
24 What's good for the other defendants is necessarily good for  
25 JBS.

1 I think what we've tried to do is in conformity  
2 with the case law make a determination that, in the words of  
3 the *EpiPen* court, you know, these are not the -- you have to  
4 assess both the level of involvement in discussions and  
5 decisions serving as the basis for the claims at issue in  
6 this case, end quote. And I think as the *EpiPen* court went  
7 on to say that mere speculation is not a basis for  
8 designating senior executives of custodians.

9 And so what we have tried to explain to plaintiffs  
10 first, and now to Your Honor in our briefing, is that we do  
11 not believe the disputed custodians satisfy that criteria.  
12 And, you know, Mr. Pierce pointed to some things that he  
13 maintained satisfied that type of criteria. But I think,  
14 you know, I may be over reading some of Your Honor's  
15 questions, but I think a lot of that, a lot of the  
16 information that Mr. Pierce provided could be characterized,  
17 as it is in a lot of the cases that we cited, as the type of  
18 sort of generalized assertions that just because someone is  
19 a senior executive they must have relevant and unique  
20 information.

21 But that is not the approach that the courts take  
22 in resolving these issues. They really hold plaintiffs to a  
23 higher standard in terms of showing, getting through the  
24 gate and demonstrating factually that the disputed senior  
25 executives have unique information about the decision making

1 that's at issue in the case before they allow them to be  
2 document custodians.

3 And we see that in the *EpiPen* case. I mean, the  
4 *EpiPen* case, the court ordered the inclusion of the CEO  
5 because plaintiffs sufficiently demonstrated that he was,  
6 quote, involved in discussions and decisions regarding the  
7 relevant price increases. That's not the case here.

8 But in contrast, in the *Krueger* case the Court  
9 came out the opposite way, which we cite to, because it  
10 determined that the disputed custodian wasn't involved in  
11 the decision making at issue.

12 So, you know, I think what we've tried to do and  
13 what we have done is appropriate given the realities of  
14 decision making at the company and in line with the case law  
15 on these types of issues.

16 THE COURT: What about Mr. Pierce's query about,  
17 well, have you done any testing, have you done any sampling,  
18 to see -- to test your assumption that there wouldn't be  
19 anything unique in those accounts?

20 MR. RASHID: Well, right, Your Honor, I think you  
21 correctly surmised you're always going to expect that two  
22 different people are going to have some unique documents,  
23 right? And so there is a proportionality analysis that  
24 would have to be built into that. But we haven't done any  
25 specific testing, but what we have done is we've talked to

1 the company, we've talked to -- we understand how the Pork  
2 Management Team works, and we understand the function and  
3 the role of the disputed CEO custodians in that framework.

4 And it's undoubtedly clear, and we do not dispute,  
5 that the CEOs have ultimate responsibility over the pork  
6 business. But as we point out, they have ultimate  
7 responsibility over beef and lamb and even operations in  
8 Australia.

9 And so I think we feel very comfortable on the  
10 basis of our inquiry to say that to the extent the -- these  
11 individuals were apprised of relevant pricing, procurement  
12 or production decisions, those interactions are going to be  
13 reflected in any interactions they had with the Pork  
14 Management Team during the time, including the president of  
15 the pork -- the President and the Chief Operating Officer of  
16 the Pork Management Team during this entire period,  
17 Mr. Marty Dooley. He held that role from 2007 to late 2019,  
18 so he was there for the entire period, and he's going to be  
19 a document custodian.

20 And so to the extent that they are getting updates  
21 on the business, it's going to be with him. To the extent  
22 they are asking questions about the business, it's going to  
23 be through him.

24 So I can't say definitively, Your Honor, that  
25 there's not going to be a single or any unique

1 communications out there as you yourself noted. But I do  
2 think that in sort of the context of the inquiry that we've  
3 done with the company and the inquiry -- and the analysis  
4 that the courts do in disputes like this as reflected by the  
5 case law that we have cited, we have made a sufficient  
6 showing to -- that plaintiffs -- that plaintiffs' request  
7 here is at the very least premature and if not, you know, if  
8 it shouldn't be entirely rejected.

9 THE COURT: All right. Mr. Pierce, anything  
10 further on the JBS issue before I have you turn to Tyson?

11 MR. PIERCE: Sure. Just a few quick points.

12 Mr. Rashid acknowledged that there may be some  
13 unique ESI for these custodians. In fact he said that he  
14 would expect that. What I would say is that in anti-trust  
15 cases these cases often turn on a relatively small number of  
16 documents.

17 Another key issue in anti-trust law is the  
18 seniority of the executives responsible for making  
19 decisions. For example, the common thing is shop talk among  
20 sales reps is often not enough to survive summary judgment;  
21 whereas, in comparison, I would think the shop talk among  
22 CEOs would be enough to survive summary judgment. And so  
23 the fact that these CEOs who have ultimate responsibility of  
24 the business have some unique ESI and are ultimately  
25 responsible for the key business decisions on which

1 liability is going to rest in this case, to us justifies  
2 under the relevance standards that it is proportional to  
3 designate these individuals as custodians, especially since  
4 Mr. Rashid has not provided any specific documentation of  
5 how much unique ESI they have, or any additional information  
6 besides a simple note that one of the custodians has a large  
7 number of documents in his file.

8 THE COURT: Okay. Mr. Rashid, yes, you wanted to  
9 respond.

10 MR. RASHID: Right. Your Honor, I mean, I think  
11 when we're -- under Mr. Pierce's theory, respectfully, a CEO  
12 would be a custodian in every anti-trust case and perhaps  
13 almost any case because they are going to have some amount  
14 of unique ESI.

15 And just to address briefly, because I didn't  
16 touch on it before, this point about burden. You know, we  
17 have conducted a preliminary review. We know that -- we  
18 know that the document custodians have, at least with  
19 respect to the e-mails, hundreds of thousands of documents  
20 not including attachments. But more to that, Your Honor, I  
21 think since these disputed custodians are the ones  
22 overseeing broader businesses, broader business issues,  
23 including as to unrelated products and unrelated markets,  
24 they are going to likely possess a high volume of irrelevant  
25 and commercially-sensitive materials that would require a

1 more time consuming and more burdensome review than with  
2 respect to the Pork Management Team.

3 And I'd also point out, Your Honor, with respect  
4 to that under the ESI Protocol order, sort of as it came up  
5 in the portion of the argument on calendars, in  
6 Section II(K), we're allowed to redact otherwise responsive  
7 documents or, quote, highly-confidential business  
8 information relating to non-pork businesses.

9 Now, these individuals are going to have a lot of  
10 highly-confidential business information relating to non-  
11 pork businesses. And so whatever that small amount of, you  
12 know, unique ESI they may have, there's going to be a ton of  
13 materials hit by plaintiffs' search terms that are going to  
14 require a very burdensome review.

15 And, you know, there was a reference to  
16 plaintiffs' proposed search terms in the last argument, and  
17 just to -- and we're working with the plaintiffs on that.  
18 We're hoping to reach an agreement with them. But the  
19 latest proposal that we have from them has 325 search terms  
20 which reflect literally thousands of combinations. And they  
21 are broad. They have words like "beef" and "chicken" in  
22 them. They have search terms for things like "price  
23 expectation" or "pricing power," without any connection to  
24 pork. Another search string is "competition within 25 of  
25 trend, challenge or outlook." Another search term is

1 "highest within five of years, decade, cost or costs."

2 And so -- and we're still working through that,  
3 Your Honor, but suffice to say we're going to end up  
4 hopefully by agreement with a world -- in a world where  
5 there's still going to be a hopefully narrowed but still  
6 broad universe of search terms. And when you're applying  
7 them to people who are not involved in the decision making  
8 that is at the heart of this litigation and who have  
9 oversight over completely unrelated businesses, it is going  
10 to make the review extremely burdensome.

11 Thank you, Your Honor.

12 THE COURT: All right. Thank you.

13 Let's turn to the custodian issue with regard to  
14 Tyson. And Mr. Pierce, you're up again.

15 MR. PIERCE: Your Honor, I don't mean to stay on  
16 JBS. I just wanted to point out that we think it's  
17 premature and unproductive to start discussing search term  
18 negotiations that are in progress and their relevance to  
19 this custodian dispute, so I'm not going to get into that.

20 What I would say is at the very least we think  
21 that once we do finalize search terms, it would be very  
22 helpful for understanding JBS's burden to see how those  
23 search terms work when they are applied to these disputed  
24 custodians, how many unique hits they generate, and that  
25 would help us better understand both sides' positions.



1 But I will now turn to Tyson unless you want to --

2 THE COURT: All right. Mr. Rashid, was there  
3 something you absolutely, positively needed to say in  
4 response to that?

5 MR. RASHID: Just, Your Honor, that that is not  
6 the approach under the cases that have been cited by both  
7 sides. Plaintiffs have to come forward with a sufficient  
8 factual showing. They have to get out of the gate; and  
9 respectfully, we don't believe plaintiffs have done so here.

10 THE COURT: I understand.

11 All right. Mr. Pierce, that doesn't necessarily  
12 mean I agree, Mr. Pierce. I'm just saying I understand the  
13 point being made.

14 MR. PIERCE: I won't test Your Honor's patience  
15 any further.

16 THE COURT: I understand the pertinence of the  
17 reference to the discussion about search terms, but let's  
18 talk about Tyson.

19 MR. PIERCE: Thank you, Your Honor.

20 I think the dispute with Tyson should hopefully be  
21 simpler to address or at least to state our positions. Don  
22 and John Tyson were both involved in the company's  
23 operations. Mr. John Tyson was chairman of the board  
24 throughout I think the entire relevant period. Don Tyson  
25 for a short period of time was prominently involved in the

1 company's operations based on contemporaneous accounts at  
2 the start of the relevant period. We think -- we understand  
3 that not all chairmen of the board should be custodians by  
4 any means, but here we're talking about two individuals who,  
5 because of their family status, control the company by  
6 having a super majority of the voting shares. So we think  
7 their status is a little different than just an ordinary  
8 chairman of the board or board member.

9 And we would also note for Don Tyson that he is --  
10 his ESI would run a relatively short period of time from I  
11 think approximately 2009 to 2011, so we think that would  
12 further minimize the burden of, again, assigning him as a  
13 custodian. So that would be our basis for these  
14 individuals.

15 THE COURT: All right. Other than -- well, I'll  
16 probably circle back with that question, but I think I -- I  
17 don't need you at this point. Let me hear from  
18 Ms. Rohrbaugh in response.

19 MS. ROHRBAUGH: Yes, Your Honor. Thank you.

20 So this is similar to what we have been hearing,  
21 just merely that these two individuals are board members.  
22 Even a chairman of the board does not seem to tie them to  
23 any sort of decision making that is relevant in this case.  
24 The fact that their name is Tyson, whether they were the  
25 grandson or the son of someone who founded the company in

1 the 1930s or 40s does not indicate that they would have  
2 information that is relevant to this case.

3 Just to sort of clarify a little bit on these two  
4 individuals, they were just board members, not executives  
5 during the time period. Don Tyson has not been the CEO  
6 since 1991. That's nearly 20 years prior to the start of  
7 the relevant time period and it's 10 years prior to Tyson's  
8 acquisition of its pork business. So the pork business  
9 wasn't even acquired until 2001; and yes, he passed away in  
10 2011, which would be early in this timeframe of the relevant  
11 time period alleged by the plaintiffs.

12 John Tyson, his son, hasn't been CEO since 2006,  
13 and it was over two years prior to the start of the relevant  
14 time period.

15 So there's not been anything to substantiate, and  
16 that is the burden, we agreed with Mr. Rashid of the  
17 standard and the burden that needs to be met here. We do  
18 not feel it's been met. We have worked with the plaintiff  
19 to explain the status of these individuals.

20 And I do sort of want to correct that we did not  
21 volunteer the CEOs. We started with a list of, probably  
22 similar to what we're hearing from Mr. Rashid, of  
23 individuals making pork decisions. The pork headquarters is  
24 actually in South Dakota. The individuals that are the CEOs  
25 and the CFOs sit in Arkansas where the chicken headquarters

1 is. So this is states away from one another, and their  
2 allegations of, you know, references to John or Don Tyson  
3 having offices near the CEO in Arkansas to us has little to  
4 do with whether they could have walked down the hall and  
5 talked to anyone related to the pork business which is  
6 situated in South Dakota.

7 So we worked with the plaintiffs. We offered 29  
8 custodians. We walked through, did our diligence of who  
9 here has relevant information covering pricing, procurement,  
10 sales, operation, production, finance; then into investor  
11 relations and Agri Stats as requested by the plaintiffs, in  
12 describing to them the structure and that they have relevant  
13 people.

14 It was actually in a mode of comprise that they  
15 requested our CEOs and our CFOs, we agreed to give the CEOs  
16 and CFOs. We do not know that they are the prime people to  
17 be targeted for this information, but we conceded that we  
18 would give them, but that's not a concession that they were  
19 the relevant individuals. So I do just want to make sure  
20 that is corrected.

21 There is the predominant focus on chicken for  
22 these individuals, the CEOs and CFOs. But these board  
23 members, Don Tyson and John Tyson that the plaintiffs are  
24 now requesting, are even a step beyond any of these  
25 executives and, you know, during this time period. We then

1 offered a further compromise, a wait-and-see approach. If  
2 you see information within the custodians, you know, we  
3 could entertain that at a later time.

4 We don't think that there's any basis, we don't  
5 think there will be any basis, to have to bring these  
6 individuals in as custodians, and we don't think that the  
7 plaintiffs have met their burden.

8 THE COURT: I guess I would maybe describe the  
9 wait-and-see approach as a compromise. That's always --  
10 that's always a possibility that when discovery -- that's  
11 how it works is that when discovery is produced, everybody  
12 looks at it and if there's reason to believe in what was  
13 produced that there are gaps, there are unique information,  
14 there's proportionate information out there elsewhere, I'm  
15 not sure it's a compromise to say, Well, we'll talk about  
16 that. You would be required to at least talk about that.

17 MS. ROHRBAUGH: Yes, Your Honor. I guess we were  
18 just opening it up that we would be happy to discuss that at  
19 any time. They wouldn't need to do anything formal to  
20 engage in those kind of discussions. Because what is  
21 required is that they meet the burden of showing that these  
22 individuals have some basis here for decision making  
23 relevant to this case. And, you know, as I will note, some  
24 courts consistently hold that simply pointing to someone's  
25 hiring and title is not enough. And that seems to be really

1 all that they have done with regard to these board members  
2 that are not even executives.

3 THE COURT: Thank you.

4 Mr. Pierce, you have the last word here.

5 MR. PIERCE: We did not mean to imply that Tyson  
6 had initially offered its CEOs as custodians and we do  
7 appreciate, you know, that we were able to reach an  
8 agreement with them regarding the inclusion of CEOs as part  
9 of a compromise for the large majority of Tyson's  
10 custodians. We do want to assure the Court that we are not  
11 pursuing a blind vendetta against all Tyson family members.  
12 For instance, Barbara Tyson is a director for Tyson Foods.  
13 We have not at any point asked for her as a custodian. Our  
14 request for John and Don Tyson is based on our understanding  
15 of their role of the company.

16 But I think at this point both sides have stated  
17 their positions pretty clearly so I don't have anything else  
18 to add.

19 THE COURT: Okay. Let me -- I'm going to go off  
20 camera for just a few minutes. I want to go back and review  
21 some things on this one. I'd like to give you a decision  
22 from the bench on this one as well, but I need just a few  
23 minutes to consolidate my thinking.

24 So feel free to block video and mute your  
25 microphones. Just keep an eye out for when I reappear.

1 (Pause in proceedings from 10:54 to 11:02 a.m.)

2 THE COURT: All right. So I'm seeing Mr. Pierce,  
3 Mr. Rashid, Ms. Rohrbaugh, and our court reporter, and I've  
4 got all sorts of other boxes but I think the pertinent folks  
5 are back on screen.

6 So having gone back and not only considered  
7 counsels' arguments, of course, but also looked again at the  
8 declarations, I am going to deny plaintiffs' motion with  
9 respect to both Tyson and JBS custodians at this time, and  
10 without prejudice to the opportunity to bring the issue back  
11 if a more specific showing can be made as discovery  
12 continues.

13 In determining whether to compel inclusion of a  
14 senior -- of a senior executive as an ESI custodian, I do  
15 look to the Sedona Principles and the fact that the courts  
16 consider both that senior executive's level of involvement  
17 in the pertinent decisions and discussions, as well as  
18 whether the ESI is likely to be unique and not available  
19 from other designated custodians.

20 In addition, both the Sedona Conference and the --  
21 among others, the judge in the *EpiPen* decision that was  
22 cited by defendants, do note, and I agree, that the party in  
23 the best position to make custodial decisions is the party  
24 who is responding to the discovery requests. And the Court,  
25 I think, generally should be loathe to mandate additional

1        custodians without a more specific reason to believe either  
2        that the production that has been made is deficient or that  
3        it was just manifestly unreasonable to leave the person out  
4        in the first place.

5                And that showing just hasn't been made, given what  
6        I've got here at this point in discovery. It could be made  
7        at some point; and if so, obviously the first thing that  
8        needs to happen is to meet and confer and hopefully that  
9        will resolve it. If not, then you come back to me and there  
10       may need to be some additional work done by defendants. But  
11       I -- what I have on the record at this point doesn't  
12       persuade me that that showing has been made and that these  
13       additional custodians ought to be mandated. So I'm denying  
14       the motion at this point for those reasons.

15               I think that covers the motion -- motions that  
16       were -- I guess one motion, several points, that were in  
17       front of me today. But there is one other thing I want to  
18       get on your radar, ask you all to meet and confer about, and  
19       get back to me on it. And that is whether it would make  
20       sense to consolidate for administrative purposes under a  
21       single caption the Winn-Dixie and Puerto Rico cases.

22               And I will note again here, as I did at the  
23       beginning of the hearing, that Winn-Dixie and Puerto Rico  
24       plaintiffs' counsel are -- unless they have dropped off, are  
25       attending the hearing. It is administratively a hassle,



1 I'll just put it that way, to manage the three different  
2 dockets. Now, I recognize that there is a difference in  
3 plaintiffs' counsel among those cases. I know that the  
4 cases have -- there's been no motion to consolidate those  
5 cases on more substantive grounds.

6 On the other hand, we are going to have a  
7 scheduling order that sets a schedule for both the  
8 *In Re: Pork* case and -- the currently consolidated case and  
9 those other two cases that will set the same schedule across  
10 the board. And it just strikes me that administratively it  
11 would be simpler for all concerned to have one docket,  
12 although any particular motion could certainly designate if  
13 it is *In Re: Pork* specific or Winn-Dixie or Puerto Rico  
14 specific. We can address that.

15 But all I would like you to do today, I'm not  
16 looking for an immediate response, all I'd like you to do is  
17 meet and confer with each other and get back to me by filing  
18 a letter -- I suppose at this point it would have to be a  
19 letter filed on all three dockets -- that gives me your  
20 input about that. If you have diverging opinions, you could  
21 describe those diverging positions. But let me know what  
22 you think of that and, if it's going to be done, what  
23 parameters you would propose setting.

24 I see Ms. Wagner, at least, waving a hand. Yes,  
25 Ms. Wagner.

1 MS. WAGNER: Yes, if I could, the parties have  
2 been discussing consolidation and we do have a draft  
3 stipulation in progress.

4 THE COURT: Bless you. That's good news to start  
5 2021 with. So when do you think you would be able to kind  
6 of wrap up that conversation and get something in front of  
7 me?

8 MS. WAGNER: I mean, I don't want to speak on  
9 behalf of everybody, but my feeling is end of next week.

10 THE COURT: That would be fine. That would be  
11 fine. I tell you what. I will look for something by the  
12 end of next week. If you get toward Thursday of next week  
13 and it looks like you need a little while longer to get it  
14 wrestled into submission, just send an e-mail to chambers  
15 and let me know it looks like it's going to be the following  
16 Wednesday or whatever.

17 So if not Friday, if not next Friday, then give me  
18 some update about when I could look for it instead. But I  
19 will then back off and let you do what it sounds like you  
20 were already working on doing, so thank you for that.

21 Anything else that we need to take up at this  
22 time?

23 Going once, going twice. All right. Thank you  
24 all. And we are adjourned.

25 MR. PIERCE: Thank you, Your Honor.

1 MR. RASHID: Thank you, Your Honor.

2 MS. WAGNER: Thank you, Your Honor.

3 (Court adjourned at 11:09 a.m.)

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7 I, Carla R. Bebault, certify that the foregoing is  
8 a correct transcript from the record of proceedings in the  
9 above-entitled matter.

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12 Certified by: s/Carla R. Bebault  
13 Carla Bebault, RMR, CRR, FCRR

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